

No. 90-280

2

Supreme Court, U.S.

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In The
Supreme Court Of The United States

OCTOBER TERM, 1990

JOAN A. KINNEY,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

**BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE CONNECTICUT APPELLATE COURT**

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QUESTIONS PRESENTED

1) Whether, when a state court has determined that a state officer is not entitled to workers' compensation benefits pursuant to the state workers' compensation act, there being no contract of employment under state law, petitioner has presented any federal question of impairment of contract under the U.S. Constitution, art. 1, § 10?

2) Whether the petitioner has properly and timely raised a federal question where it was not raised at trial or on the appeal question reserved to the state supreme court, nor raised as a stated issue on motion for reargument nor on subsequent appeal to the state appellate court?

3) Whether, for the purpose of Supreme Court review, the state proceeding was final at the time the state supreme court denied claimant's motion to reargue, January 2, 1990, and therefore the petition for writ of certiorari docketed August 7, 1990 is not timely?

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No. 90-280

**In The
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OCTOBER TERM, 1990

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STATE OF CONNECTICUT,
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**BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE CONNECTICUT APPELLATE COURT**

The State of Connecticut, respondent, for reasons set out herein, urges the Court to deny issuance of a writ of certiorari to review the judgment of *Kinney v. State*, Connecticut Appellate Court, No. A.C. 8817, March 28, 1990.¹ (Petitioner's Appendix p. 40.)

¹ This is an unreported judgment order relating to *Kinney v. State*, 213 Conn. 54, 566 A.2d 670, November 28, 1989.

COUNTER STATEMENT OF THE CASE

Following the death in September, 1986 of her husband, Judge Frank Kinney of the Connecticut Superior Court, the petitioner filed a claim for workers' compensation benefits as the dependent surviving spouse of Judge Kinney, pursuant to the state Workers' Compensation Act, and in particular Conn. Gen. Stat. § 31-306, which provides for survivors' benefits.

The State contested the claim on the ground that state superior court judges are officers of the state and not "employees" within the definition of the Workers' Compensation Act. An employer-employee relationship, as those terms are defined in the act, must be found in order for the State Workers' Compensation Commission to have jurisdiction over a claim for compensation. *Castro v. Viera*, 207 Conn. 420, 433, 541 A.2d 1216 (1988).²

The petitioner argued that the decedent was an employee pursuant to an implied contract of employment with the state and the compensation trial commissioner so found. The respondent state consistently opposed this argument, and denied that an employer-employee relationship or that a contract of employment existed for purposes of the Workers' Compensation Act. *Kinney v. State*, 213 Conn. 54, 58, 566 A.2d 670 (1989).

At no time during the trial did petitioner raise the issue of impairment of contract pursuant to the U.S. Constitution, art. I, § 10. (See Finding & Award, Petitioner's Appendix pp. 1-25.)

The State appealed the commissioner's award to the review division of the Workers' Compensation Commission. That tribunal, pursuant to statute, reserved to the state appellate court the question: "Is a Judge of the Superior Court of

² The claim of petitioner is derivative of her husband's.

Connecticut an 'employee' as defined in Sec. 31-275(5), C.G.S.?" The state supreme court transferred the reservation to itself and answered the question in the negative, holding that because a judge of the superior court is a public officer as opposed to an employee, he does not fall within the purview of the Workers' Compensation Act. *Kinney v. State*, 213 Conn. at 66. (Petitioner's Appendix pp. 25a-37.)

Our [state supreme court] decisions concerning the eligibility of individuals working in the public sector for workers' compensation benefits have long distinguished between public officers and public employees, and have held that public officers not expressly included within the definition provided by § 31-275(5) are not "employees" for the purposes of the act.

Kinney, 213 Conn. at 61 citing *McDonald v. New Haven*, 94 Conn. 403, 417-18, 109 A.176 (1920) and *Sibley v. State*, 89 Conn. 682, 685, 96 A.161 (1915).

As during the trial, the federal constitutional issue was not presented as an issue by petitioner to the supreme court on the reservation. (Appendix, p. 1A, Claimant's counter statement of issue.)

Petitioner moved for reargument on the reserved question before the supreme court and in that motion first made reference in a single line to "the state and federal constitutions," but did not clearly raise a federal constitutional issue. (Appendix, pp. 2A-3A.) The motion was denied January 2, 1990. (Petitioner's Appendix p. 38.)

By order of December 12, 1989, the compensation review division reversed the compensation trial commissioner's

Finding and Award due to lack of jurisdiction. (Petitioner's Appendix p. 39.)³

Asserting that the review division still had jurisdiction of the state's original appeal to it, petitioner moved to dismiss that appeal, thereby leaving the trial commissioner's award in effect and valid. (Appendix, p. 5A.) This motion was denied on January 12, 1990. (Appendix, p. 6A.) No federal issue was raised on the motion to dismiss.

On January 18, 1990, petitioner appealed the review division's denial of the motion to dismiss to the state appellate court. That court, after a hearing on motion of the court, affirmed the compensation review division's order of December 12, 1989 by order of March 28, 1990. (Petitioner's Appendix p. 40.)

³ Petitioner filed a motion to vacate the order of December 12, 1989, pending a decision on her motion to reargue. Motion to vacate was held in abeyance until motion to reargue was denied on January 2, 1990, then denied January 12, 1990. (Appendix, p. 4A.)

ARGUMENT — REASONS FOR DENYING THE WRIT

I. THE PETITIONER HAS RAISED NO FEDERAL QUESTION FOR REVIEW AND HER RELIANCE ON *FISK V. JEFFERSON POLICE JURY* IS MISPLACED AND INAPPROPRIATE.

As an initial matter, the petitioner has not specified what question she seeks to present to the Court, merely stating that it is the “same issue” as the one presented in *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885). In that case, Fisk had performed legal services as district attorney for a Louisiana parish. When the parish refused to pay him for those services due to a Louisiana constitutional provision limiting the amount of taxes the parish could raise, Fisk sued, claiming that the Louisiana law was unconstitutional because it interfered with his implied contract with the parish to pay him for services rendered, and this Court agreed. *Id.*

In the present case, petitioner attempts to apply the holding of *Fisk* to the facts of her case, alleging that the workers’ compensation benefits she claimed were, in effect, consideration due to the decedent for past services rendered by him as a judge of the superior court, based on an implied contract between him and the state. This strained argument and attempted analogy is untenable.

Contrary to the petitioner’s claim, workers’ compensation benefits cannot be equated to “past due remuneration” payable under contract. They are granted neither by contract nor grace, but solely by legislative enactments. *See Conn. Gen. Stat. Chapter 568, §§ 31-275 et seq.* In order to qualify for workers’ compensation benefits, an individual must first establish that he is an “employee” as that term is defined in the Act. Without satisfying that threshold requirement, an individual simply has no entitlement to benefits under the Act.

The burden in a workers' compensation claim rests upon the claimant to prove that he is an "employee" under the act and thus is entitled to invoke the act. (Citations omitted.) This relationship is threshold because it is settled law that the "commissioner's jurisdiction is 'confined by the Act and limited by its provisions.' " (Citation omitted.)

Castro v. Viera, 207 Conn. 420, 426, 541 A.2d 1216 (1988).

The central question in the present case, the one decided by the Connecticut Supreme Court, was whether the decedent judge was an "employee" *as that term is defined in the Act*. The claim raised was and is strictly a matter of statutory definition, not a question of implied contract.

The Connecticut Supreme Court ruled that a superior court judge is a constitutional state officer, Conn. Const. art. 5, § 1, and not an employee, and therefore is not eligible for workers' compensation benefits. *Kinney*, 213 Conn. at 61. As the state supreme court has held in another case, "an act merely fixing salaries of officers creates no contract in their favor. . . ." *Pineman v. Oechslin*, 195 Conn. 405, 410, 488 A.2d 803 (1985) citing and quoting *Dodge v. Board of Education*, 302 U.S. 74, 78-79 (1937). This is solely a question of state law. It is axiomatic that, absent a contract, there can be no impairment of contract. Because this case presents only the question of the proper interpretation of a state statute, and not impairment of contract under the federal constitution, there is no federal question presented.

II. THE PETITIONER HAS NOT PROPERLY OR TIMELY RAISED THE ISSUE OF CONTRACT IMPAIRMENT PURSUANT TO THE U.S. CONSTITUTION, ART. I, § 10, AND THEREFORE THE COURT LACKS JURISDICTION.

Title 28 U.S.C. 1257(a) (1988)⁴ mandates that a federal question must have been "drawn in question" or "specially set up or claimed" below for the Supreme Court to have review jurisdiction. The Rules of the Supreme Court (effective January 1, 1990) require a petitioner to "show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment. . . ." Sup. Ct. R.14.1(h). The rule also requires reference to quotations from the record or specific references to where the federal issue appears *in the record*. Petitioner has failed to provide such references in her petition.

As previously stated, the federal claim was not made at trial nor on the reservation to the state supreme court. Respondent finds no such claim presented to the compensation review division as asserted in the instant petition (p. 11). Petitioner's seven-page motion for reargument to the state supreme court states only in a single line that the court's failure to find that workers' compensation benefits are due pursuant to an implied contract of employment "interferes with her contractual right as protected by both the state and federal constitutions." (Appendix, pp. 2A-3A.) (Motion denied without argument and without opinion January 2, 1990, Petitioner's Appendix p. 38.)

Petitioner has continually argued and briefed the issue of the existence of an implied contract, which argument both the state appellate and supreme courts have rejected. "Impairment of contract" is first mentioned, but not stated as an issue, in petitioner's brief filed March 19, 1990, in the

⁴ Petitioner asserts jurisdiction pursuant to the former Title 28 U.S.C. § 1257(3), the pertinent part of which is essentially the same.

appeal to the state appellate court. (Statement of issue, Appendix, p. 7A.) This was long *after* the decision in *Kinney v. State*, 213 Conn. 54, issued November 28, 1989, which is challenged in the instant petition, and long *after* the motion for reargument to the state supreme court had been denied on January 2, 1990. Briefs and oral arguments before state courts are not ordinarily part of the record and cannot be used to establish that a federal question was raised. *Live Oak Water Users' Association v. Railroad Commission*, 269 U.S. 354, 357-59 (1926). Respondent submits that the petitioner has not timely or properly raised the federal constitutional issue in her claim. Raising the federal question for the first time in a motion or petition for rehearing is generally insufficient unless the court actually entertains the petition and expressly decided the question. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). The order denying the motion for rehearing must be more than a cursory statement that the motion has been considered and denied. *Consolidated Turnpike Co. v. Norfolk & Q.V.R. Co.*, 228 U.S. 326, 333-34 (1913). It must appear that the federal question was in fact passed upon in considering the motion for reargument. *Forbes v. State Council*, 216 U.S. 396 (1910).

Because the petitioner failed to timely or properly raise the issue of impairment of contract under the federal constitution, this Court should reject her petition for certiorari.

III. FOR THE PURPOSE OF SUPREME COURT REVIEW, THE STATE PROCEEDING WAS FINAL AT THE TIME THE STATE SUPREME COURT DENIED CLAIMANT'S MOTION TO REARGUE, JANUARY 2, 1990, AND THEREFORE THE PETITION FOR WRIT OF CERTIORARI DOCKETED AUGUST 7, 1990 IS NOT TIMELY.

The state supreme court's answer to the reserved question in *Kinney*, 213 Conn. 54, left nothing more of substance to be decided by the compensation review division other than

to reverse the trial commissioner's decision based on lack of jurisdiction, which it did on December 12, 1989. (Petitioner's Appendix p. 39.) Once the motion to reargue before the supreme court was denied on January 2, 1990 (Petitioner's Appendix p. 38), there was a "final judgment" sufficient for review, assuming *arguendo* there was a sufficient and timely claimed federal question. Where there is nothing more of substance to be decided in the trial court, a judgment is final within the meaning of 28 U.S.C. § 1257. *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963). The judgment for this claim was final as of January 2, 1990 as it was then binding on the review division to reverse the trial commissioner's decision for lack of jurisdiction. *Mills v. State of Alabama*, 384 U.S. 216 (1966).

Title 28 § 2101(c) requires a petition for writ of certiorari to be filed within ninety days of a final judgment, which time would have expired April 2, 1990. This petition is not timely filed.

CONCLUSION

The State contends that review is neither necessary nor warranted by this Court to consider the issue presented by petitioner. For all the reasons set out above, the petition for writ of certiorari should be denied.

Respectfully Submitted,

STATE OF CONNECTICUT

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No. 90-280

**In The
Supreme Court Of The United States**

OCTOBER TERM, 1990

JOAN A. KINNEY,
Petitioner,

v.

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Respondent.

**APPENDIX TO BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
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A.

**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

NO. 13687

JUNE 30, 1989

**JOAN A. KINNEY,
Claimant**

V.

**STATE OF CONNECTICUT,
Respondent**

**BRIEF OF THE CLAIMANT-APPELLEE
JOAN A. KINNEY**

[p. ii]

COUNTER STATEMENT OF ISSUE

Was the Honorable Rhoda L. Loeb, Workers' Compensation Commissioner for the Third Congressional District, clearly erroneous when she found that for purposes of the Workers' Compensation Act, Honorable Frank J. Kinney, Jr. was working under a contract of employment?

B.

**SUPREME COURT
STATE OF CONNECTICUT**

S.C. NO. 13687 : WORKER'S COMPENSATION
COMMISSION

JOAN A. KINNEY : COMPENSATION REVIEW
DIVISION

VS. : AT HAMDEN

STATE OF CONNECTICUT : DECEMBER 8, 1989

MOTION FOR REARGUMENT

Pursuant to Section 4122 of the Practice Book, JOAN A. KINNEY moves for reargument of the decision of the court published November 28, 1989 in the Connecticut Law Journal, 213 Conn. 54. The grounds for moving for reargument are as follows:

The court has failed in three respects to apply the proper standards of review in its determination that Joan A. Kinney's decedent was not, for purposes of worker's compensation, an employee.

. . . .

[p. 5]

. . . .

It is necessary to comprehend *Castro* [*v. Viera*, 207 Conn. 420 at] 433-434, [541 A.2d 1216] in order to understand the facts Commissioner Loeb found.

. . . .

[p. 6]

. . . .

Based upon this articulation of the law [*in Castro*], and based upon the findings of fact by Commissioner Loeb, this Court must find either that Hon. Frank J. Kinney worked

pursuant to an implied in fact contract and therefore must find that he was an employee for purposes of worker's compensation, and therefore, Joan A. Kinney is entitled to her contractual monetary benefits; or this court must find that although Hon. Frank J. Kinney was working pursuant to an implied in fact contract and was therefore an employee for purposes of worker's compensation, Joan A. Kinney, despite her contractual right, nevertheless is not entitled to her contractual monetary benefits merely because of policy decisions. To so find interferes with her contractual right as protected by both the state and federal constitutions.

.

THE PLAINTIFF, JOAN A. KINNEY

BY

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C.

CASE CASE [sic] NO. 786 CRD-3-88-11

COMPENSATION
REVIEW BOARD [sic]

JOAN A. KINNEY, Widow
of FRANK J. KINNEY (Deceased)
CLAIMANTAPPELLEE

VS.

WORKERS'
COMPENSATION
COMMISSION

STATE OF CONNECTICUT
EMPLOYER
RESPONDENTAPPELLANT

DECEMBER 14, 1989

MOTION TO VACATE

The claimant moves the Compensation Review Division vacate its order of December 12, 1989, as the claimant timely filed a § 4122 Motion to Reargue. It is therefore premature to issue said order.

NO ARGUMENT THE CLAIMANT, JOAN A. KINNEY
NO EVIDENCE BY /s/ Roger J. Frechette

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ORDER

The above motion having been presented, the same is hereby DENIED 1/12/90

/s/ John Arcudi

John Arcudi, Chairman
Compensation Review Division [sic]
Workers' Compensation Commission

CERTIFICATION

12/14/89 To counsel of record.

/s/ Roger J. Frechette

ROGER J. FRECHETTE

D.

CASE NO. 786 CRD-3-88-11

**COMPENSATION
REVIEW BOARD [sic]**

**JOAN A. KINNEY, WIDOW
OF FRANK J. KINNEY (Deceased)
CLAIMANTAPPELLEE**

VS.

**WORKERS'
COMPENSATION
COMMISSION**

**STATE OF CONNECTICUT, EMPLOYER
RESPONDENTAPPELLANT**

JANUARY 5, 1990

MOTION TO DISMISS

Claimant, Joan A. Kinney, upon the denial by the Supreme Court for her Motion to Reargue in case styled Joan A. Kinney v. State of Connecticut 213 Conn. 54, said denial dated January 2, 1990, which denial makes final, for state court purposes, the action by the Supreme Court on the reservation by the Compensation Review Division on its motion pursuant to Sec. 31-324 C.G.S. Said Joan A. Kinney moves the Compensation Review Division dismiss the appeal of the State of Connecticut from the decision of Honorable Rhoda L. Loeb because of the failure of the State to comply with the twenty (20) day rule of Sec. 31-297(b) and pursuant to *Castro v. Vierra*, 207 Conn. 420, as more fully sets forth in the attached brief.

THE CLAIMANT, JOAN A. KINNEY

BY /s/ Roger J. Frechette

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**ARGUMENT REQUESTED
EVIDENCE NOT REQUIRED**

E.

CASE NO. 786 CRD-3-88-11

: COMPENSATION
REVIEW DIVISION

JOAN A. KINNEY, Depen. Widow
of FRANK J. KINNEY (Deceased)
CLAIMANT-APPELLEE

: WORKERS'
COMPENSATION
COMMISSION

vs.

STATE OF CONNECTICUT
EMPLOYER
RESPONDENT-APPELLANT

: JANUARY 12, 1990

ORDER

Claimant's January 8, 1990 Request For Oral Argument
on the January 5, 1990 Motion to Dismiss is hereby denied.

Claimant's January 5, 1990 Motion to Dismiss is hereby
denied.

/s/ John Arcudi

John Arcudi, Chairman
Compensation Review Division
Workers' Compensation Commission

F.

**APPELLATE COURT
STATE OF CONNECTICUT**

NO. A.C. 8817

JANUARY TERM

**JOAN A. KINNEY,
Claimant**

VS.

**STATE OF CONNECTICUT,
Respondent**

**BRIEF OF THE CLAIMANT-APPELLANT
JOAN A. KINNEY
[Filed 3/19/90]**

[p. i]

STATEMENT OF ISSUE

Did the Compensation Review Division err when it failed to grant plaintiff's motion to dismiss defendant's appeal from Commissioner Loeb's award of benefits in favor of plaintiff when it is admitted the State of Connecticut failed to comply with the 20-day time constraints mandated by General Statutes § 31-297(b), when it is conceded that the State of Connecticut is an employer, and when Commissioner Loeb found plaintiff had entered into an employment relationship with the defendant, thereby distinguishing this case from *Castro v. Viera* 207 Conn. 420 (1988)?